No. 20-1603

In The Supreme Court of the United States

SUSAN BENNETT,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF GOLDWATER INSTITUTE AND CATO INSTITUTE AS AMICI CURIAE SUPPORTING PETITIONER

ILYA SHAPIRO
TREVOR BURRUS
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

JACOB HUEBERT*
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

**Counsel of Record*

Counsel for Amici Curiae Goldwater Institute and Cato Institute

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

IDENTITY AND INTEREST OF AMICI CURIAE[1]

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases, and it files amicus briefs when its or its clients' objectives are directly implicated.

Goldwater devotes substantial resources to defending the constitutional principles of free speech and freedom of association. Specifically relevant here, its litigators represent attorneys challenging mandatory association and compelled subsidies for speech in several cases, including *Boudreaux v. La. State Bar Ass'n*, 3 F.4th 748 (5th Cir. 2021); *Schell v. Chief Justice & Justices of the Okla. Sup. Ct.*, 2 F.4th 1312 (10th Cir. 2021); and *Crowe v. Or. State Bar*, 989 F.3d 714 (9th Cir. 2021), *petition for cert. filed*, No. 20-1678 (June 2, 2021).

The Cato Institute is a nonpartisan think tank dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for

---

[1] Rule 37 Statement: The parties have consented to the filing of this brief. Amici gave counsel of record for all parties timely notice of their intention to file this brief. Counsel for amici affirms that no counsel for any party authored any of this brief and that no person or entity, other than amici, their members, or counsel funded its preparation or submission.

Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case concerns amici because of its importance to the freedoms of speech and association. Amici appear often in this Court and others in free-speech cases. *See, e.g.*, *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *Minn. Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018).

INTRODUCTION AND SUMMARY OF ARGUMENT

Janus v. AFSCME, 138 S. Ct. 2448, 2486 (2018), held that the government may not deduct any payment to a union from an employee's paycheck unless the employee has first affirmatively consented to pay and there is "clear and compelling" evidence that the employee "freely" waived his or her First Amendment right *not* to pay. In this case, the lower court concluded that the existence of a union membership agreement and dues deduction authorization, which Petitioner signed before the Court decided *Janus*, warranted dismissal of Petitioner's First Amendment challenge to the deduction of union dues from her paychecks. App. 9–16.

But a signed union membership agreement, standing alone, is *not* clear or compelling evidence that an

employee freely waived his or her First Amendment right not to pay a union. This is most obviously true where, as here, the employee signed an agreement prior to the decision in *Janus*, in a jurisdiction where, at that time, it was impossible to exercise her right not to pay either fees or dues to a union. *See* Pet. 6.

Yet it is also true of agreements signed after *Janus*. Often, employees are not informed of their First Amendment rights before they are presented with a union membership agreement. That is all too often by design, as states and unions have taken steps to prevent employees from learning of their *Janus* rights before they are asked (or "asked") to sign a union membership agreement.

The Court should grant certiorari to make clear that *Janus*'s waiver requirement applies to people who sign union membership agreements, and that a signed membership agreement that does not clearly advise an individual of his or her First Amendment rights, standing alone, does not constitute clear and compelling evidence that an employee's ostensible waiver of his or her First Amendment rights was knowing and voluntary.

ARGUMENT

A union membership agreement alone does not establish a valid First Amendment waiver because public-sector employers and unions commonly seek to prevent employees from learning of their *Janus* rights.

In *Janus*, the Court held that the government may not deduct any payment to a union from someone's paycheck unless the person "affirmatively consents to pay" beforehand. 138 S. Ct. at 2486. An agreement to join a public-sector union and to pay for it to engage in lobbying or other speech activities is a waiver of the individual's First Amendment right not to join and pay—and "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id*.

"[S]uch a waiver cannot be presumed." *Id.* Instead, a waiver of First Amendments rights is only valid if the individual knows of the right, and freely and intentionally decides to abandon it. *See Patterson v. Illinois*, 487 U.S. 285, 292 (1988). That means the individual must be informed of his or her rights before he or she can validly waive them. *Cf. id.* at 292–93 (validity of waiver turned on whether individual was "made sufficiently aware" of constitutional right). For workers to validly waive their right not to support a union, someone must inform them of that right.

Since *Janus*, however, public-sector employers and unions have taken steps to prevent workers from learning of their First Amendment rights under *Janus*.

Courts cannot assume—as the Seventh Circuit did here, App. 9–16—that a signed union membership agreement that fails to expressly advise an individual of his or her First Amendment rights eliminates the need for any other evidence that would be necessary to show a valid waiver.

One way states have prevented workers from learning of their rights under *Janus* (or *Harris v. Quinn*, 573 U.S. 616 (2014), which protects care providers who receive government subsidies from being compelled to pay union fees) is by enacting laws that give workers' complete contact information—typically including their home addresses and personal phone numbers and email addresses, and sometimes including even their social security numbers—to union officials, while prohibiting anyone else from obtaining that contact information (or sometimes even just their names). This enables unions to reach these people and obtain waivers from them—whereas organizations that wish to advise them of their right not to sign are unable to do so.

For example, after this Court decided *Harris*, public-sector unions in Washington State saw to the adoption of a ballot measure that forbids anyone from obtaining the contact information of care providers protected by *Harris*—except for a union that has been certified or recognized as providers' exclusive representative. *See Boardman v. Inslee*, 978 F.3d 1092, 1123–24 (9th Cir. 2020) (Bress, J., dissenting) (citing Wash. Rev. Code §§ 42.56.640(2)(b), 42.56.645(d)(1), 43.17.410(1)), *petition for cert. filed*, No. 20-1334 (Mar.

19, 2021). That law was enacted for the express purpose of preventing anyone from contacting providers about their rights under *Harris*. *See id.* at 1124–26.

Other states have enacted similar laws to give unions exclusive access to the contact information of employees, care providers, or both. These include California,[2] Hawaii,[3] Illinois,[4] Maine,[5] Maryland,[6] New Jersey,[7] New York,[8] and Vermont.[9] *See also* Or. Rev. Stat. §§ 192.355(3), 192.363, 192.365, 243.804(4)(a) (giving unions access to employees' contact information but allowing others to obtain it only if they "show by clear and convincing evidence that the public interest requires disclosure").

Many union-friendly state governments don't just give unions employees' contact information but also give unions the special privilege of meeting in person with new employees shortly after they are hired, either at employee orientation sessions or in group or individual meetings. *See, e.g.*, Cal. Gov't Code § 3556 (giving

---

[2] Cal. Gov't Code §§ 3558, 6254.3.

[3] Haw. Rev. Stat. § 89-16.6(a), (d).

[4] 5 Ill. Comp. Stat. 140/7.5(oo), (pp), 315/6(c), (c-5).

[5] 26 Me. Rev. Stat. § 975(2).

[6] Md. Code, State Pers. & Pens. §§ 3-208, 4-2A-08; Md. Code, Educ. § 6-407; Md. Code, General Provisions §§ 4-311(b)(3), 4331.

[7] N.J. Stat. 34:13A-5.13(c), (d).

[8] N.Y. E.O. 183 (June 27, 2018); N.Y. Civ. Serv. Law §§ 208(4)(a), 209-a(1)(h).

[9] 3 Vt. Stat. §§ 909(c), 910, 1022(c), 1023; 16 Vt. Stat. §§ 1984(c), 1985; 21 Vt. Stat. §§ 1646, 1738(c), 1739; 33 Vt. Stat. § 3619.

union "mandatory access to . . . new employee orientations"); 5 Ill. Comp. Stat. 315/6(c-10)(1)(C) (giving union opportunity to meet with new employees for an hour) (enacted December 2019); 26 Me. Rev. Stat. § 975(1)(C) (giving union right to meet with new employees for at least 30 minutes); Md. Code, State Pers. & Pens. § 3-307(b)(3), (5) (giving union 20 minutes to "collectively address all new employees . . . during a new employee program" and authorizing state to "encourage," but not mandate, attendance); Md. Code, Educ. §§ 6-407.1, 6-509.1(a)(1) (giving unions access to "new employee processing" in schools); Mass. Gen. Laws, ch. 150E, § 5A(b)(iii) (giving union right to meet with new employees for at least 30 minutes); N.J. Stat. 34:13A-5.13(b)(3) (giving union "right to meet with new employees . . . for a minimum of 30 and a maximum of 120 minutes"); N.Y. Civ. Serv. Law § 208(4)(b), (c) (giving union rights to meet with new employees and "mandatory access" to new employee orientations); Or. Rev. Stat. § 243.804(1)(b)(B) (giving union right to meet with new employees for 30 to 120 minutes); Wash. Rev. Code § 41.56.037 (giving union right to meet with new employees for at least 30 minutes, with employee attendance not mandatory).

The purpose of such meetings is not to inform employees of their right to choose whether to join a union. Instead, the meetings facilitate unions' persuasion of new employees to sign union membership agreements. Indeed, unions and their supporters openly admit this. *See, e.g.*, Adam Ashton, '*Everything Is at Stake': California Unions Brace for a Supreme Court Loss*, Sac.

Bee, Oct. 24, 2017, https://bit.ly/3ezQYXH ("Union leaders say the law that gives them access to new employee orientation is particularly significant [as a means of mitigating *Janus*'s anticipated effect on membership]."); Catherine L. Fisk & Martin H. Malin, *After* Janus, 107 Cal. L. Rev. 1821, 1873–74 (2019); Michael Wasser, *Making the Case for Union Membership: The Strategic Value of New Hire Orientations*, Jobs with Justice Education Fund, Sept. 2016, https://bit.ly/3BkvgAy. And unions seek to have the meetings last as long as possible—the New Jersey and Oregon statutes cited above expressly allow them to last as long as two hours—because "[r]esearch finds that in-person orientations lasting at least one hour are most effective at increasing member commitment." Karla Walter, *State and Local Policies to Support Government Workers and Their Unions*, Center for American Progress Action Fund, June 27, 2018, https://bit.ly/3kzVDg0.

Further evincing these states' intent to prevent individuals from becoming informed of their First Amendment rights, California enacted legislation prohibiting disclosure of information about when and where new employee orientations will take place to anyone except employees, the union, and vendors providing services at the meetings. Cal. Gov't Code § 3556 (amended on the day *Janus* was decided, June 27, 2018). The purpose of such legislation, of course, is to ensure that no one can stand outside these meetings to inform attendees of their rights before they enter. *See* Aaron Tang, *Life After* Janus, 119 Colum. L. Rev. 677, 701 (2019) (pro-union scholar noting that

"[s]uch efforts seem likely to help stem the tide of membership losses").

Even where the law does not expressly prohibit disclosure of such meetings' times and locations, it is practically impossible for people who wish to inform workers of their rights to obtain such information through public-records requests before a meeting occurs—especially given governments' common delays in responding to such requests and unions' obstructionism. *See, e.g.*, *Boardman*, 978 F.3d at 1123 (Bress, J., dissenting) (describing unions' obstruction of requests for providers' contact information, which resulted in the information being "outdated by the time [the requesting organization and individuals] finally received them").

Some states have also responded to *Janus* by enacting statutes that affirmatively prohibit public employers from advising workers of their right not to join or pay a union. For example, Illinois responded to its loss in *Janus* by adopting a law that *forbids* public-sector employers from advising employees of their rights—and requires that they instead "refer all inquiries about union membership to the exclusive bargaining representative [i.e., the union]." 5 Ill. Comp. Stat. 5/14(c-5), 315/10 (amended to include these provisions Dec. 19, 2019); *see also* Joe Tabor, *Illinois House Passes Bill to Make It Harder for Public Employees to Leave Unions, Recover Fees*, Illinois Policy, Oct. 29, 2019, https://bit.ly/2UmMn4m (describing this and other features of the legislation).

Other states, anticipating or responding to *Janus*, have enacted laws prohibiting public employers from either discouraging union membership or encouraging union resignation—with the obvious intention that employers would therefore say nothing about union membership to avoid violating the law. *See* Cal. Gov't Code §§ 3550, 3553 (amended to include this rule on the day *Janus* was decided, June 27, 2018); N.J. Stat. 34:13A-5.14 (effective May 18, 2018). One month before *Janus*, New Jersey enacted a financial penalty for violations, requiring a public employer to reimburse a union for "any losses suffered . . . as a result of the public employer's unlawful conduct." N.J. Stat. 34:13A-5.14(c).

On the day *Janus* was decided, California enacted a statute requiring employers to meet and confer with the union before sending employees any notice of their *Janus* rights. And if the union does not approve the message's content, the statute also allows the union to distribute a message together with the employer's notice. Cal. Gov't Code § 3553; *see also* Ben Bradford, *California Unions Have Prepared for* Janus, CapRadio, June 27, 2018, https://bit.ly/3hOL7ja (describing urgency to pass bill in anticipation of *Janus*).

These laws were all adopted with one obvious end in mind: to take steps to obstruct as much as possible any effort to fully inform public employees of their right not to join or subsidize a public-sector union.[10]

---

[10] Such tactics are reminiscent of similar efforts by private sector unions to avoid informing employees of their rights under

Even where the law does not expressly prohibit or discourage it, public-sector employers generally have little incentive to inform employees of their rights.[11] An official might fear that a union would charge the employer with an unfair labor practice if it were to provide employees with information on how to avoid joining, or how to resign from, the union. Even putting

---

Communication Workers of America v. Beck, 487 U.S. 735 (1988). *See, e.g.*, Jeff Canfield, *What a Sham(e): The Broken* Beck *Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049 (2001); Brian J. Woldow, *The NLRB's (Slowly) Developing* Beck *Jurisprudence: Defending a Right in a Politicized Agency*, 52 Admin. L. Rev. 1075 (2000) (documenting refusal of unions and government to abide by *Beck* and similar cases). *See also Monson Trucking Inc. v. Anderson*, 324 N.L.R.B. 933, 935 (1997) (union failed to provide employee *Beck* rights notice); *Chauffeurs, Teamsters, Warehousemen & Helpers Union, Local No. 377 v. Blanchard*, Case No. 8-CB-9415-1, 2004 WL 298352 (N.L.R.B. Feb. 11, 2004) ("I find that the membership application with the 'Notice' hidden on the second and third page did not serve to adequately apprise newly-hired employees of their *Beck* rights.").

[11] There are exceptions. Michigan recently adopted a rule requiring the state personnel director to remind workers annually of their right not to pay union dues or fees and requiring workers to agree annually to union paycheck deductions. Mich. Civ. Serv. Comm'n R. 6–7 (2020), https://tinyurl.com/7p974z4d.

Also, several state attorneys general have found dues deductions based on a union's reporting alone to be unconstitutional under *Janus* and have therefore recommended that their respective states collect union dues only after advising employees of their First Amendment rights and obtaining their consent directly. *See* Letter from Alaska Attorney General Kevin G. Clarkson to Gov. Michael J. Dunleavy (Aug. 27, 2019), https://tinyurl.com/y4t6yjpz; Op. Att'y Gen. Ind. 2020-5 (2020), https://tinyurl.com/39j4cvkx; Op. Att'y Gen. Tex. KP-0310 (2020), https://www.texasattorneygeneral.gov/sites/default/files/opinion-files/opinion/2020/kp-0310.pdf.

that threat aside, it might be easier for an employer to avoid potential conflicts with a union by saying nothing on the issue as the manager typically has nothing to gain, and something to lose, by acting against the union's interests. Some managers might themselves be union members or supporters who would prefer that employees not exercise their right not to join the union. *Cf.* R. Theodore Clark, Jr., *Politics & Public Employee Unionism: Some Recommendations for an Emerging Problem*, 44 U. Cin. L. Rev. 680, 684 (1975) (noting that the government employees who bargain with unions often are themselves union members). And, of course, managers might not inform providers or employees of their rights because they, too, do not understand *Janus*, or because it is simply easier to do things as they have always been done. *See* Daniel DiSalvo, *The Future of Public-Employee Unions*, Nat'l Aff., Spring 2020, https://bit.ly/36MeXi3 ("Human-resource departments often just hand out union cards to new hires to be signed with other benefits materials.").

Many public-sector employers not only fail to advise employees of their rights; they also fail to obtain a worker's consent before deducting dues from their paychecks. Instead, they let unions solicit and retain membership agreements from employees—implicitly entrusting the unions to ensure that those agreements constitute knowing and voluntary waivers of workers' First Amendment rights—and then simply accept at face value the union's claims that this or that employee freely chose to join. Several state governments codified this practice in response to *Janus*. *See, e.g.*, 5 Ill. Comp.

Stat. 315/6(f-20), (f-25) (dues authorization to be made to union, which is then to communicate it to employer); N.J. Stat. 52:14-15.9e (employer and union authorized to agree that employees may only request dues deductions from union; employee's electronic signature suffices); N.Y. Civ. Serv. Law § 208(1)(b) (union entitled to dues deduction "upon presentation [to the employer] of dues deduction authorization cards").

Once a union has claimed an individual as a member in this way, the employee could be—like Petitioner here—legally locked into paying union dues for years. Some union-allied state governments have enacted legislation making it difficult for (supposed) union members to stop paying dues. Hawaii, for example, has enacted a statute that provides that employees may only ask the union (not the state) to cease dues deductions during a 30-day period before the anniversary of the employee's initial dues authorization. Haw. Rev. Stat. § 89-4(c). In New Jersey, an employee who signs a union membership agreement has just *ten days* each year during which he or she may request an end to dues deduction. N.J. Stat. 52:14–15.9e. Illinois has (retroactively) authorized union membership agreements that include irrevocable dues authorizations lasting longer than one year with a ten-day opt-out window. 5 Ill. Comp. Stat. 315/6(f). Other states have similarly amended their dues-deduction laws to require government employers to continue deducting union payments from an employee who once authorized dues deductions unless the employee provides a revocation notice during a window period set either by law or in a payroll

deduction form.[12] And even where statutes do not mandate or specifically authorize it, many collective bargaining or union membership agreements—like the agreement here, App. 4–5—include similar automatic renewals and short opt-out windows.[13]

What if an individual paying dues seeks to stop because his or her alleged "consent" was not actually informed or freely given, as in this case? Illinois, California, and other states have disclaimed any responsibility, asserting that that is a private dispute between the individual and the union—even as the state continues to take dues from the individuals' paychecks on the union's behalf.

The Ninth Circuit even found (unlike the lower courts here, App. 33 n.6) that such unauthorized dues deductions do not even constitute "state action" that could support a constitutional claim. *See Belgau v. Inslee*, 975 F.3d 940, 946–49 (9th Cir. 2020); *see also Jarrett v. Marion County*, No. 6:20-cv-01049-MK, 2021 WL 65493, *3 (D. Or. Jan. 6, 2021) (one of numerous district court decisions applying *Belgau* to find no state action where state deducted dues based on forged

---

[12] *See* Cal. Gov't Code § 1157.12; Cal. Educ. Code § 45060; Colo. Rev. Stat. § 24-50-1111(2); Conn. Publ. Act No. 21-25, §§ 1(a)(i-j); Del. Code tit. 19, § 1304; Mass. Gen. Laws, ch. 180 § 17A; Nev. Rev. Stat. § 288.505(1)(b); N.Y. Civ. Serv. Law § 208(1)(b); Or. Rev. Stat. § 243.806(6); Wash. Rev. Code § 41.80.100(d).

[13] Since *Janus*, numerous lawsuits have challenged these agreements (so far unsuccessfully), particularly those entered before *Janus*, for impermissibly burdening workers' exercise of their First Amendment rights. *See, e.g.*, *Bennett v. Council 31, AFCSME*, 991 F.3d 724, 729–33 (7th Cir. 2021).

signatures on union membership agreements), *appeal docketed*, No. 21-35133 (9th Cir. Feb. 19, 2021). Thus, individuals have no constitutional remedy for union dues deductions made without their informed consent.

In light of these obstructionist tactics, the only way to ensure that individuals can meaningfully exercise their right to decide freely whether to pay dues is to require that the person be informed of his or her rights *before* he or she signs a union membership agreement. That, after all, is what *Janus* itself requires: "Unless employees clearly and affirmatively consent *before* any money is taken from them, [the constitutional] standard cannot be met." 138 S. Ct. at 2486.

Officials have taken these measures that inhibit workers' ability to exercise their First Amendment rights for the benefit of public-sector unions that fund their campaigns for office. It is in their interest to sustain and increase the flow of membership dues to the unions so that unions' contributions will likewise continue or increase. Indeed, the unionization of the in-home care providers whose rights were upheld in *Harris* illustrates how union-backed politicians use laws to increase union membership and revenue and thus sustain the flow of union funds to their campaigns. *See* Jacob Huebert, Harris v. Quinn*: A Win for Freedom of Association*, 2013-2014 Cato Sup. Ct. Rev. 195, 208–09 (describing Illinois's cycle of unions contributing to the campaigns of officials who, in turn, unionize more groups). Such officials have no incentive to inform workers of their right not to pay a union, and they have

acted on their strong incentive to *prevent* workers from exercising that right.

For these reasons, among others, a union membership agreement that does not notify the individual of his or her First Amendment rights cannot be clear or compelling evidence that the employee validly waived his or her First Amendment right not to pay money to the union. The lower court's decision in this case, which accepted a pre-*Janus* union membership agreement as eliminating the need for any evidence of a waiver, was therefore erroneous. If uncorrected, the decision will allow unions and their allies in government to succeed in their efforts to prevent workers from exercising the rights that *Janus* is supposed to protect.

CONCLUSION

To ensure that governments and unions respect the First Amendment rights that *Janus* upheld, the petition for certiorari should be *granted*.

Respectfully submitted,

ILYA SHAPIRO
TREVOR BURRUS
CATO INSTITUTE
1000 Mass. Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

JACOB HUEBERT*
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

**Counsel of Record*